RECORD AND BRIEF

Nos. 16-74; 16-86

Supreme Court U.S.
AUG 12 2016
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IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, *et al.*,

Petitioners,

v.

MARIA STAPLETON, *et al.*,

Respondents.

ST. PETER'S HEALTHCARE SYSTEM, *et al.*,

Petitioners,

v.

LAURENCE KAPLAN,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS AND THE THIRD CIRCUIT COURT OF APPEALS RESPECTIVELY

BRIEF OF CHURCH ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

G. DANIEL MILLER
CONNER & WINTERS, LLP
1850 M Street N.W., Suite 600
Washington, D.C. 20036
(202) 887-4783

LAURENCE A. HANSEN*
HUGH S. BALSAM
LOCKE LORD LLP
111 South Wacker Drive, Suite 4100
Chicago, IL 60606
(312) 443-0456
lhansen@lockelord.com

* *Counsel of Record*

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Church Alliance is a coalition of the chief executive officers of more than thirty-seven denominational benefit programs. These benefit programs include programs associated with mainline and evangelical Protestant denominations, two Jewish movements, and Catholic schools and institutions. They provide retirement and health benefits to more than one million clergy, lay workers, and their family members.[2] The Church Alliance is uniquely situated to submit an amicus brief in support of the petitioners in these two cases. The Church Alliance was formed in the mid-1970s to secure the exemption of "church plans" from the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* (2012). The current definition of "church plan" in ERISA section 3(33), 29 U.S.C. § 1002(33) (2012), is the result of an amendment made by Congress in 1980. That amendment is at the heart of the Third and Seventh Circuit decisions and these subject petitions. That amendment, largely authored by Church Alliance representatives, was drafted with one primary purpose in mind—to enable the retirement and other employee benefit plans of church "agencies"

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for either party authored this brief, in whole or in part, and that no person or party other than the named *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amicus* certifies that counsel of record for all parties received notice of the intent of the *amicus* to file this brief at least 10 days prior to its due date; all parties have consented to the filing of this brief.

2. A list of the sponsors of the benefit programs represented within the Church Alliance is set forth in the Appendix.

to continue to have church plan status. The decisions of the Third and Seventh Circuits abrogate the Church Alliance's efforts that secured the passage of the current church plan definition in 1980. This is, of course, of great concern to the Church Alliance.

But this is not the Church Alliance's only concern. The Third and Seventh Circuit decisions result in some denominational benefit plans being entitled to church plan status because of the particular theological polity or governance structure of the related church or convention or association of churches, while other denominational benefit plans would not be entitled to church plan status, similarly due to the particular theologically-based polity or structure adopted by the related church or convention or association of churches.[3] This difference in treatment stems from the Third and Seventh Circuit's determination that, in order for a plan to be a church plan, it must be established by a church. In the case of churches that are more hierarchically governed, their benefit plans will be entitled to church plan status because they have been established by the church. However, in many other cases, particularly in the case of Protestant churches and the

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3. Unless provided otherwise, the word "church" as used in this brief, includes a "convention or association of churches" (often conversationally referred to as a "denomination"). The phrase "convention or association of churches" has historically been used by Congress to refer to the organizational structures of congregationally-governed churches. Thus, the inclusion of that phrase together with the word "church" in ERISA's "church plan" definition and other federal statutes is intended to afford congregational churches the same treatment afforded hierarchical churches. *See Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283, 1288 (8th Cir. 1985).

Jewish movements, the employee benefit plans of church-associated ministries (which are not themselves houses of worship) will not be entitled to church plan status under the Third and Seventh Circuit's reasoning because these plans are established by the church ministries themselves, and not by the particular church with which they are associated.

The Church Alliance proposed the current church plan definition to Congress in a manner that took (and takes) these differences in church polity and governance structure into account. In the Church Alliance's view, Congress was constitutionally constrained to do so, in order that one form of church polity would not be favored over another. The Church Alliance believes that the Third and Seventh Circuit decisions have interpreted the church plan definition in a way that, at best, is constitutionally questionable and, at worst, violates the Establishment Clause.

If the Third and Seventh Circuit decisions are allowed to stand, they will have a significant and potentially devastating financial impact on church ministries and their employees, as well as on the church benefit programs themselves. Moreover, they could result in plans covering employees of organizations employed by different churches and church ministries being treated differently depending on each church's polity, i.e., its governance and structure.

These cases are thus the proper vehicles, and the time is opportune, for resolving the issue of what constitutes a church plan under ERISA. Litigation over this issue is increasing, and the uncertainty that litigation has produced casts a cloud over the rules under which church

benefit programs have long operated. The Church Alliance therefore submits that this Court's review is needed now to resolve an irreconcilable and active conflict on an important issue.

SUMMARY OF ARGUMENT

This Court should grant the petitions to clarify that "church plans" under ERISA can include plans established by organizations controlled by or associated with a church but which themselves are not churches. The question presented is of enormous and recurring consequence, both to church ministries and participants in their benefit plans. This Court's guidance is needed to resolve confusion among the lower courts.

ARGUMENT - THE PETITIONS SHOULD BE GRANTED

I. The Question Presented Is of Enormous and Recurring Consequence

A. The Decisions of the Third and Seventh Circuits Create Massive Upheaval and Irreversible Damage to Church Ministries and Plan Participants

If the underlying decisions are allowed to stand, they will have a devastating financial effect on church ministries and participants in their employee benefit plans. This is because the definition of "church plan" in ERISA and its counterpart under the Internal Revenue Code ("Code"), 26 U.S.C. § 414(e), implicate a number of federal statutes.

1. Effect on Church Ministries

First, the underlying decisions will expose church ministries to a host of *per diem* penalties for violating ERISA's reporting and disclosure requirements. *See Dep't of Labor, Reporting and Disclosure Guide for Employee Benefit Plans*, (Sept. 2014), *available at* https://www.dol.gov/ebsa/pdf/rdguide.pdf. As noted in the petitions, Respondents are seeking judgments that will trigger billions of dollars in penalties from the Petitioners for violations of ERISA's disclosure requirements. The potential application of these penalties could bankrupt many church ministries.

Second, the underlying decisions will require church ministries to begin paying premiums to the PBGC for their defined benefit retirement plans, perhaps even for past years. Respondents will undoubtedly characterize PBGC coverage as a crucial protection for plan participants. However, many church ministries have decided not to elect to be covered by ERISA and to apply amounts that would be paid to the PBGC to fund plan benefits instead, recognizing that the PBGC is severely underfunded. The U.S. Government Accountability Office, for example, has indicated that the PBGC's "financial future is uncertain." *Pension Benefit Guaranty Corporation Insurance Programs*, U.S.G.A.O., http://www.gao.gov/highrisk/pension_benefit/why_did_study (last visited Aug. 9, 2016).

Third, church ministries and church benefit programs could find themselves in violation of various federal securities laws for (i) not registering the church retirement plans and their underlying investment funds as investment companies under the Investment Company Act of 1940,

15 U.S.C. § 80a-1 *et seq.* (2012); (ii) not having registered the offering of interests in church retirement plans as securities under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (2012); (iii) not enrolling participants or accepting contributions only through registered broker-dealers in violation of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (2012); or (iv) not registering themselves as investment advisers under the *Investment Advisers Act of 1940*, 15 U.S.C. § 80b-1 *et seq.* (2012).

Congress has adopted a series of interrelated provisions exempting from these requirements various parties and interests relating to church plans.

Section 3(c)(14) of the Investment Company Act of 1940 exempts from the definition of "investment company" under that Act any "church plan" described in Code section 414(e), 26 U.S.C. § 414(e), and any "company or account that . . . is established by a person that is eligible to establish and maintain such a plan." 15 U.S.C. § 80a-3(c)(14) (2012).

Section 3(a)(2) of the Securities Act of 1933 exempts from the application of that Act:

> any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank . . . which interest, participation, or security is issued in connection with . . . a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940.

15 U.S.C. § 77c(a)(2) (2012).

Section 3(a)(13) of the Securities Act of 1933 exempts from regulation under that Act any "security issued by or any interest or participation in any church plan, company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940." 15 U.S.C. § 77c(a)(13) (2012).

Section 3(g) of the Securities Exchange Act of 1934 excludes from the broker-dealer provisions of that Act any "church plan…company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940." 15 U.S.C. § 78c(g) (2012).

Section 203(b)(5) of the Investment Advisers Act of 1940 excludes from the requirements of that Act:

> any plan described in section 414(e) of title 26, any person or entity eligible to establish and maintain such a plan under title 26, or any trustee, director, officer, or employee of or volunteer for any such plan or person, if such person or entity, acting in such capacity, provides investment advice exclusively to, or with respect to, any plan, person, or entity or any company, account, or fund that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940.

15 U.S.C. § 80b-3(b)(5) (2012).

If only a church can establish a "church plan," then the following consequences result under the federal securities laws in connection with a plan established and maintained by a church ministry: (i) any investment fund options in the plan may be unregistered investment companies required to be registered, the interests in that church plan being securities the offering of which should have been registered; (ii) those who have acted to enroll participants in the plan and facilitate contributions may be unregistered broker-dealers acting in violation of law; and (iii) the church ministry may be an unregistered investment adviser required to be registered.

The potential impacts of these cascading securities law violations could include all contracts of the church plan being voidable by the counterparties to those contracts, each participant in the plan having a right of rescission making the plan responsible for any investment loss (where the funds needed to pay for such losses would of necessity come from other participants' accounts), being subject to cease and desist orders, civil monetary penalties, and even criminal liability for acting in certain capacities without appropriate registration or licensure.

Fourth, the decisions will force church ministries to provide for continuation coverage in their medical plans following termination of employment as required by ERISA and the Code. 29 U.S.C. §§ 1161–69 (2012); 26 U.S.C. § 4980B (2012). Church plans are exempt from these requirements unless they have elected to be covered by ERISA.[4] 29 U.S.C. §1003(b)(2) (2012); 26

4. Although exempt from these requirements, most church health care plans provide continuation health coverage following

U.S.C. § 4980B(d)(3) (2012). Church ministries sponsoring such plans could be exposed to a $100 per day penalty for "each individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1) (2012). Church ministries sponsoring self-insured plans would also be subject to penalties for failing to include the cost of health coverage in their employees' Form W-2s. 26 U.S.C. §§ 6051(a)(14), 6721 and 6722 (2012). The exemption for self-insured church plans not covered by ERISA would not be available. IRS Notice 2012-9, Q&A-21, IRB 2012-4, 315.

Fifth, if a health plan covering two or more church-affiliated employers is not a church plan, it may be a multiple employer welfare arrangement (MEWA) subject to regulation under state insurance laws. The Church Plan Parity and Entanglement Prevention Act of 1999 (P.L. 106-244), which generally preempts the application of state insurance laws to church plans as defined in Code section 414(e), 26 U.S.C. § 414(e) (2012), would not be available.

MEWAs are also required to register with and report annually to the Department of Labor by filing a Form M-1. The penalties for failure to report can be as much as $1,000 per day. 29 U.S.C. § 1132(c)(5) (2012); 29 C.F.R. § 2560.502c-5(b)(1) (2015). However, church plans are exempt from these filing requirements and related penalties. 29 C.F.R. §§ 2520.101-2(c)(2)(i)(C) - (D) (2015).

These devastating consequences could fall upon church ministries that reasonably relied upon an interpretation

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an employee's termination of employment, in a manner similar, if not identical, to the continuation coverage mandated for ERISA-covered plans.

of ERISA consistently held by the three federal agencies charged with administering that statute for more than thirty years. Some of them, including the petitioners, obtained private letter rulings from the IRS confirming their status as church plans.

2. Effect on Plan Participants

The sudden loss of church plan status could also cause many retirement plans sponsored by religious organizations to lose their qualified tax status under Code section 401, 26 U.S.C. § 401 (2012), with disastrous consequences for the employees participating in such plans. Religious organizations sponsoring these plans have reasonably relied on exemptions and special provisions in the Code that apply only to church plans that have not elected to be subject to ERISA.[5] If those exemptions and special provisions no longer apply, a church plan could lose its qualified status retroactively because neither its form nor its operation will have complied with the requirements for qualification. The effects of plan disqualification will be dramatic and severe for plan participants in at least four ways.

First, a participant in a disqualified church plan will be taxed on contributions to the plan when they are

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5. *See*, the flush language at the end of 26 U.S.C. § 401(a) (2012), which exempts non-electing church plans from the requirements of 26 U.S.C. § 401(a)(11), (12), (13), (14), (15), (19) & (20) (2012). These requirements relate to joint and survivor annuities, mergers and consolidations, assignment or alienation of benefits, time of benefit commencement, certain social security increases, withdrawals of employee contributions, and distributions after plan termination, respectively.

vested regardless of when they are distributed. 26 U.S.C. § 402(b)(1) (2012). In contrast, a participant in a qualified plan is not taxed on his or her interest in the plan until it is distributed to the participant. 26 U.S.C. § 402(a) (2012).

Second, amounts set aside in any trust to fund retirement benefits will be reduced by income taxes paid on the trust's earnings. Trusts funding qualified plans are exempt from federal income taxes. 26 U.S.C. § 501(a) (2012). However, trusts funding nonqualified plans are taxable entities that must pay federal income taxes on their earnings at corporate tax rates. *Id.*

Third, as a nonqualified plan, the plan would undoubtedly violate the provisions of Code section 409A, 26 U.S.C. § 409A (2012), which restrict deferred compensation. This could expose a participant to an additional tax equal to twenty percent of the value of the plan benefit includable in the participant's gross income. 26 U.S.C. § 409A(a)(1)(B)(i)(II) (2012).

Finally, a participant receiving a distribution from a nonqualified plan will be unable to defer federal income taxes on the distribution by rolling it over into an IRA or another qualified plan. 26 U.S.C. § 402(c) (2012).

B. The Decisions Upset Church Ministries' Interpretation of ERISA's Church Plan Exemption Based on Three Decades of Consistent Interpretation by the Agencies Charged By Congress to Administer ERISA

If allowed to stand, the decisions in the Third and Seventh Circuits will contradict the consistent

interpretation of ERISA held for over thirty years by the three federal agencies charged with administering that statute—the Internal Revenue Service, the Department of Labor, and the Pension Benefit Guaranty Corporation (PBGC). Myriad religious organizations have relied upon the agencies' interpretation of ERISA since the statute's enactment. Respondents will undoubtedly argue that the agencies' interpretation of ERISA is wrong because it is contrary to ERISA's text. If so, that meaning has been hidden for more than thirty years—hidden from the courts, hidden from the agencies charged with administering ERISA, hidden from thousands of affected church ministries that have relied upon the agencies' interpretation, and hidden from plaintiffs' attorneys.

II. The Court's Guidance is Necessary to Resolve Confusion Among the Lower Courts

A. The Courts of Appeals Are Divided Over the Scope of ERISA's Church Plan Exemption

The absence of guidance from this Court has led to confusion in the lower courts over whether "church plans" can only be established by churches. The Courts of Appeals have rendered hopelessly inconsistent opinions on the extent of ERISA's church plan definition.

The Third, Seventh, and Ninth Circuits have held that only a church can establish a church plan. *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175, 177 (3rd Cir. 2015), *petition for cert. filed*, No. 16-86 (July 18, 2016); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 530 (7th Cir. 2016), *petition for cert. filed*, No. 16-74 (July 15, 2016); *Rollins v. Dignity Health*, ____ F. 3d __, No. 15-15351, 2016 WL 3997259, at *1 (9th Cir. July 26, 2016).

In contrast, the Fourth and Eighth Circuits have held that a church plan need not be established by a church so long as it is established and maintained by an organization that is controlled by or associated with a church. *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001); *Chronister v. Baptist Health*, 442 F.3d 648, 651-54 (8th Cir. 2006).

B. The Circuit Split Has Resulted in Confusion and Inconsistent Rulings Among the District Courts

This conflicting appellate precedent has, predictably, left the district courts struggling to determine the scope of ERISA's church plan definition. Indeed, the district court in *Stapleton*, while concluding that only a church can establish a church plan, nevertheless conceded that numerous courts "have come to the opposite conclusion," including the Fourth and Eighth Circuits and many district courts. 76 F. Supp. 3d 796, 802 (N.D. Ill. 2014).

In light of this confusion, church ministries are vulnerable to numerous individual and class complaints challenging the church plan status of their employee benefit plans. The time and expense involved in challenging such claims, combined with even a remote risk of a potentially astronomical damage award, can create intense pressure to settle.

For example, the church ministry in *Overall v. Ascension Health*, 23 F. Supp. 3d 816 (E.D. Mich. 2014), despite having received a decision from the district court that its plan was a church plan, *id.* at 819, settled its case while an appeal was pending before the Sixth Circuit.

Order & Final Judgment at 1, *Overall*, No. 13-cv-11396-AC-LJM (E.D. Mich. Sept. 17, 2015).

More recently, the church ministry in *Lann v. Trinity Health Corp.* has entered into a preliminary settlement agreement settling its church plan case. Motion for Preliminary Approval of the Class Action Settlement Agreement at 1, *Lann*, No. 14-cv-2237 (D. Md. Aug. 1, 2016).[6] It has agreed to settle the case despite having obtained a district court ruling that a "church plan" under ERISA can include a plan established and maintained by an organization that is "controlled by or associated with a church." *Lann*, No. 14-cv-2237, 2015 WL 6468197, at *1 (D. Md. Feb. 24, 2015).

III. These Cases Are Proper and Timely Vehicles to Consider the Scope of ERISA's Church Plan Exemption

The *Kaplan* and *Stapleton* cases are perfect vehicles for addressing the extent of ERISA's church plan definition. The question is squarely presented as a pure matter of law, which means that there are no disputes of fact. Moreover, rulings in favor of petitioners would not require the Court to overrule any of its precedents, as this Court has never addressed the extent of ERISA's church plan definition.

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6. The proposed settlement also includes the plans that were the subject to *Chavies v. Catholic Health East*, No. 2:13-CV-01645 (E.D. Pa.), which was consolidated with *Lann* solely to effect the settlement. *Memorandum in Support of Plaintiff's Motion for Preliminary Approval of the Class Action Settlement* at 2 n.4, *Lann*, No. 14-cv-2237 (D. Md. Aug. 1, 2016).

CONCLUSION

For the foregoing reasons, the Church Alliance urges this Court to grant the writs of certiorari.

Respectfully submitted,

G. DANIEL MILLER
CONNER & WINTERS, LLP
1850 M Street N.W., Suite 600
Washington, D.C. 20036
(202) 887-4783

LAURENCE A. HANSEN*
HUGH S. BALSAM
LOCKE LORD LLP
111 South Wacker Drive, Suite 4100
Chicago, IL 60606
(312) 443-0456
lhansen@lockelord.com

* *Counsel of Record*

Attorneys for Amicus Curiae

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APPENDIX

APPENDIX — RELIGIOUS ORGANIZATIONS REPRESENTED WITHIN THE CHURCH ALLIANCE

American Baptist Churches in the U.S.A.

Associate Reformed Presbyterian Church

Association of Unity Churches International

Baptist General Conference–Converge Worldwide

Board of Pensions of the Church of God

Christian Brothers Services

Christian Church (Disciples of Christ)

Christian Churches Pension Plan

Christian Reformed Church in North America

Church of God Benefits Board

Church of the Brethren

Church of the Nazarene

Churches of God, General Conference

Community of Christ

Episcopal Church

Appendix

Evangelical Covenant Church

Evangelical Free Church of America

Evangelical Lutheran Church in America

Evangelical Presbyterian Church

Free Methodist Church of North America

General Conference of Seventh-Day Adventists

International Church of the Foursquare Gospel

Joint Retirement Board for Conservative Judaism

Lutheran Church-Missouri Synod

Mennonite Church

National Association of Free Will Baptists

Presbyterian Church (U.S.A.) Board of Pensions

Presbyterian Church in America

Reform Pension Board

Reformed Church in America

Southern Baptist Convention

Appendix

Unitarian Universalist Association

United Church of Christ

United Methodist Church

Wesleyan Church

Wisconsin Evangelical Lutheran Synod

Young Men's Christian Association